APPENDIX A

Filed December 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1733, 00-1734 and 00-1746

UNITED STATES OF AMERICA

v.

JOAN H. KALB
Appellant in No. 00-1733
(D.C.Crim. No. 99-cr-00074E)

UNITED STATES OF AMERICA

v.

GARRICK M. BECK
Appellant in No. 00-1734
(D.C.Crim. No. 99-cr-00075E)

UNITED STATES OF AMERICA

v.

STEPHEN M. SEDLACKO
Appellant in No. 00-1746
(D.C.Crim. No. 99-cr-00076E)

Appeal from the United States District Court
for the Western District of Pennsylvania

District Judge: Honorable Maurice B. Cohill, Jr.

Argued October 26, 2000

Before MANSMANN, ALITO and FUENTES,
Circuit Judges.

(Filed December 12, 2000)

OPINION OF THE COURT

MANSMANN, Circuit Judge.

These appeals comprise the latest installment in a series of legal skirmishes waged between the group known as "The Rainbow Family" or "The Rainbow Family of Light" and the United States Forest Service. Garrick Beck, Joan Kalb, and Stephen Sedlacko, participants in a 1999 Rainbow Family gathering, appeal from Judgments in Criminal Cases entered following the conviction of each of a misdemeanor violation of 36 C.F.R. S 261.10(k): "Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." These appellants challenge the Forest Service regulations, arguing that the relevant regulations do not apply to them as individuals and, in the alternative, that the regulations are constitutionally infirm both facially and as applied. Because we are convinced that the challenged regulations were properly applied to the individual appellants and do not transgress constitutional requirements, we will affirm the Judgments in a Criminal Case entered by the District Court.

I.

The facts underlying this appeal are set forth in detail in the opinion of the District Court, *United States v. Kalb*, 86 F. Supp. 2d 509 (W.D.Pa.2000). Accordingly, our recounting of the facts is brief. For a period of weeks during the summer of 1999, some 20,000 people attended a Rainbow Family[1] gathering in Pennsylvania's Allegheny National Forest. Each of the appellants was present at that gathering and was identified by a Forest Service criminal investigator as having had some role in organizing or administering the event.

In early July 1999, these three individuals were issued citations charging each with use of Forest Service land without special use authorization in violation of 36 C.F.R. § 261.10(k).[2] Related regulations provide that such "special use authorization" must be obtained for "noncommercial group uses." *Id.* § 251.50. "Special uses" include all uses other than timber harvesting, grazing and mineral extraction. *Id.* "Group use" is defined as "an activity conducted on National Forest System lands that involves a group of 75

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[1] The Rainbow Family has been described in other litigation as:

> . . . an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and [to] exchange, develop, express and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country.

Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D.Or.1998), *aff'd*, 201 F.3d 1120 (9th Cir. 2000)(internal citations omitted).

[2] A number of Forest Service regulations were recodified in 1999. These changes altered the numbering of relevant sections. Because the District Court and the parties have consistently referred to these regulations by their original numbers, we do the same.

or more people, either as participants or spectators." *Id.* § 251.51.

The application for a permit is a simple one-page document which essentially requires the applicant to supply information concerning the location and description of the National Forest System land upon which the activity will take place, the facilities that the applicant seeks to use, the estimated number of participants and spectators, the starting and ending times and dates for the proposed activity, and the name of an adult who will sign a special use authorization on behalf of the applicant. *Id.* § 251.54.

Each of the appellants was advised by a Forest Service representative of the need for the Rainbow Family to apply for a special use permit and was asked to sign the permit application. Each refused.

In August 1999, the appellants were charged with violating the Forest Service regulations and, after a two-day bench trial in October 1999, each was found guilty. On June 1, 2000, each of the appellants was sentenced to a three-month term of imprisonment and was directed to pay a special assessment. A $500 fine was assessed against two of the appellants.[3] These sentences were stayed pending the filing and resolution of any appeal. These timely appeals followed and were consolidated for disposition.

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[3] The penalty provision of the regulatory scheme, 36 C.F.R. § 261.1b provides that:

> Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C. section 551, unless otherwise provided.

II.

The appellants raise a number of challenges to the Judgments entered against them. We consider these challenges seriatim, mindful that because of the "many legal contests between the Rainbow Family and the Forest Service," we do not write on a blank slate. *Kalb*, 86 F. Supp. 2d at 517.

We address first the contention that the regulations underlying the appellants' convictions criminalize only group rather than individual conduct: "This statute has no actus reus element that can be committed by an individual."

We reject this position because it is unnecessary that the statute specifically set forth the individual as the actor as opposed to the group; the statute need not begin "No person shall . . ." (as appellants argue) for individual liability to attach to a violation. The liability of an individual – or a group – occurs when the four requirements of the statute are proven.

Not one court considering the application of 36 C.F.R. § 261.10(b) has hesitated to apply that section to individual defendants. We are not persuaded to chart a different course here. In rejecting the appellants' argument, we are guided by the opinion in *United States v. Johnson*, 159 F.3d 892 (4th Cir.1998). There, the court clarified that proof of a violation of section 261.10(k)

> requires the government to demonstrate: 1) use, 2) of National Forest land, 3) by a noncommerical group of 75 or more persons, either as participants or spectators, 4) without special use authorization.

Id. at 894. The record demonstrates that these requirements were satisfied with respect to each of the appellants. Each knew of the permit requirement, that the gathering of which they were a part was large enough to implicate that requirement,[4] and that an application for a permit had not been made. Armed with that knowledge, these individuals could have avoided liability under the regulations by opting not to participate in the gathering on National Forest land where it was clear that a special use authorization was required and had not been granted. The record is devoid of any indication that it was "imperative for [the] Rainbow Family to gather in a national forest, as opposed to some other location, to pray and to discuss their views." *United States v. Linick*, 195 F.3d 538, 543 (9th Cir. 1999).

To read the regulation and the penalty for its violation as inapplicable to individuals who use the National Forest System as part of a group, with deliberate disregard for the group permit requirement, would effectively eviscerate the special use authorization process. We decline to do so.

III.

The appellants next attack particular aspects of the regulations on constitutional grounds, arguing first that the regulations are impermissibly vague and overbroad because they fail to establish standards for the public and for those enforcing the regulations "sufficient to guard against the arbitrary deprivation of liberty interests." *City*

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[4] The appellants do not contend that they were not part of the "group" that used the forest. Thus, this is not a case in which an individual is charged under the regulation simply because he or she happened to be in the same location with 75 or more persons who belonged to a "group" of which the individual is not a part.

of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . .." *Id.* at 56, 119 S.Ct. 1849 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)). The regulations here do not foster uncertainty. Unlike the ordinance at issue in *Morales*, the regulations clearly define what conduct is prohibited; there is no need for speculation.[5] Accordingly, we reject appellants' allegation that the regulatory scheme is unconstitutionally vague.

IV.

The appellants next contend that the regulation requirement that a special use authorization permit be signed by a member of the group burdens the .First Amendment rights of individuals attending a Rainbow Family gathering. According to the appellants, "[t]he challenged regulation is unconstitutional because it is not narrowly tailored to serve a significant governmental purpose nor does it

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[5] The Supreme Court in *Morales* considered the constitutionality of Chicago's Gang Congregation Ordinance. This ordinance prohibited "'criminal street gang members' from 'loitering' with one another or with other persons in any public place." 527 56, 119 S.Ct. 1849. "Loitering" was defined as "remain[ing] in any one place with no apparent purpose." *Id.* at 47, 119 S.Ct. 1849. The ordinance was void for vagueness where "[i]t [was] difficult to imagine how any citizen of the City of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 56-57, 119 S.Ct. 1849. "[T]he vagueness that doom[ed] this ordinance [was] not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering [was] covered by the ordinance and what [was] not." *Id.* at 57, 119 S.Ct. 1849. The regulations challenged here are not subject to the same uncertainty; the prohibition is clearly delineated.

leave open ample alternate channels of communication." By now there is a body of case law addressing the constitutionality of the signature requirement; this requirement has been upheld uniformly and we will uphold it here.

Even where expressive conduct takes place in a public forum, the government may impose reasonable "time, place and manner" restrictions on that conduct. *United States v. Johnson*, 159 F.3d at 895 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). These restrictions comport with constitutional requirements if they (1) are content neutral; (2) are "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. The appellants do not dispute that the signature requirement is content neutral. They argue instead that the requirement is not narrowly tailored and that it forecloses alternative channels of communication.

These appellants represent that they and other participants in the Rainbow gatherings meet as "individuals who admit of no structure for leadership or hierarchy of decision-making." They then contend that the "refusal of the Government, through the guise of this permit scheme, to permit large groups of individuals to gather on Forest Service land, without first organizing and thereafter delegating authority, is unduly burdensome." According to appellants, any government interest served by the permit process "can all be fully served by a system which assesses proposed land uses on a case-by-case basis but does not require an agent for the group to sign a special use authorization." In essence, the appellants would have us hold that in order to satisfy the requirement that a restriction on activity protected by the First Amendment be narrowly

tailored, the government is required to omit the signature requirement from the permit scheme. We disagree.

The Supreme Court makes clear in *Ward* that in order to pass constitutional muster, a time, place and manner restriction need not be the "least restrictive means" of vindicating the government's interest. *See* 491 U.S. at 789-97, 109 S.Ct. 2746. Instead it is only necessary that the government "could reasonably have determined that its interests overall would be served less effectively without [the regulation] than with it." *Id.* at 801, 109 S.Ct. 2746. That certainly is the case here.

The interests vindicated by the regulatory scheme in general were detailed by the Court of Appeals for the Fourth Circuit in Johnson:

> The regulations, as well as the Department of Agriculture's comments accompanying them make clear that the regulations serve three purposes. They are designed to (1) "protect resources and improvements on National Forest System lands," (2) "allocate space among potential or existing uses and activities," and (3) "address concerns of public health and safety."

159 F.3d at 895 (quoting 60 Fed. Reg. 45,258, 45,262 (1995)). The Court then concluded that:

> The permit requirement serves these three goals in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service personnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur.

Id.

That the interests served by the signature requirement in particular would be served less effectively were that requirement eliminated has also been recognized. We agree with the reasoning of the District Court in *United States v. Masel* F. Supp. 2d 903, 919 (W.D.Wis.1999):

> With respect to the signature requirement, requiring an individual to sign a special use authorization as a representative of the group is necessary to ensure that the group will be responsible for the actions of its members as a whole, to give the authorization legal effect and to subject the group to the authorization's terms and conditions. Without the ability to impose terms and conditions on all members of a group, the government would clearly be extremely hampered in its ability to achieve any of its interests. The terms and conditions of a group use permit would have little teeth if they only applied to the individual who signed the permit.

Based on these analyses of the interests served by the regulatory scheme generally and the signature requirement in particular, we are convinced that the regulations are sufficiently "narrowly tailored" to serve legitimate government interests.

We are similarly convinced that imposition of the signature requirement "leave[s] open ample alternative channels for communication." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. The regulation does not preclude the use of state or private property for Rainbow Family gatherings. It also does not impinge upon the right of the Rainbow Family to meet on federal land which does not fall within Forest Service jurisdiction or to gather in groups made up of fewer than 75 individuals. Again, we agree with the District Court's conclusion in *United States v. Masel:*

> The Rainbow Family has a choice; if it does not wish to perform an act that is antithetical to its core belief [-- designating a representative to sign a permit application –] it can hold its gatherings in an area that does not have a permit requirement.

54 F. Supp. 2d at 918.

Because we find that the challenged signature requirement represents a reasonable time, place and manner restriction on expressive conduct, we reject the appellants' argument that the requirement transgresses the guarantees of the First Amendment.[6]

V.

We turn next to the appellants' challenge to that portion of the regulatory scheme authorizing the Forest Service to attach terms and conditions to the grant of a permit. The appellants contend that 36 C.F.R. § 251.56 is unconstitutionally overbroad in that it confers "unbridled discretion" upon representatives of the Forest Service.[7] The appellants

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[6] We reject, too, the appellants' claim that it was "legally impossible" for them to sign a special use authorization. The appellants maintain that because they are merely associated with the Rainbow Family on a loose voluntary basis and lack authority to act on behalf of the group, they cannot sign a special use permit. This argument has been raised many times but has never been credited. To recognize the appellant's claim of legal impossibility would permit groups, however loosely-organized, to "maintain a fiction that they have no leaders or agents" and thereby to undercut the special use authorization process. *United States v. Masel*, 54 F. Supp. 2d at 920. "[B]ecause the attendees at the gathering could have designated [appellants] as [persons] who would sign the permit on behalf of the group without breaking any laws, it was not legally 'impossible' for [them] to sign the permit." *Id.*

[7] This provision reads:

(a) General. Each special use authorization must contain:

challenge the facial validity of these regulations; because the appellants did not apply for and did not receive a special use permit, the regulatory provisions at issue were never applied to them.

In evaluating this argument we are guided by the Supreme Court's admonition that "the doctrine of overbreadth is appropriately applied in a facial challenge only where 'the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.'" *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1265 (3d Cir.1992) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). "Accordingly, 'there must be a realistic danger that the [regulation] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). "[A] litigant must establish something more than a mere possibility that a particular grant of discretion might be used unconstitutionally in some other setting." *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 66 (3d Cir.1990).

(ii) Such terms and conditions as the authorized officer deems necessary to (A) Protect Federal property and economic interests; (B) Manage efficiently the lands subject to the use or adjacent thereto; (C) Protect other lawful users of the land adjacent to or occupied by such use; (D) Protect lives and property; (E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and (G) Otherwise protect the public interest.

As we have noted, the numbering of this section was amended in 1999.

In *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 751, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), the Supreme Court set forth a two-part test governing when a First Amendment facial challenge may be made to an allegedly overbroad licensing scheme. First, the regulation must confer upon a governmental official or agency "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." 486 U.S. at 759, 108 S.Ct. 2138. Second, "[t]he law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.*[8]

The appellants contend that the terms and conditions portion of the special use regulatory scheme, 36 C.F.R. § 251.56, is subject to facial challenge under the test announced in *Lakewood* because the broad discretion granted to the Forest Service could, at some future point, be used to chill protected speech by groups with disfavored political or social views. The appellants focus particularly on language in the regulation which permits the Forest Service to impose upon a special use permit terms and conditions deemed necessary "to protect the public interest." We have reviewed the terms and conditions provision against the background of the case law and are

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[8] The Supreme Court has left open the issue of whether an individual should be allowed to mount a facial challenge on the basis of unguided discretion in regulating the *manner* of speech, instead of excessive discretion in regulating whether speech should be prohibited altogether. *See Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)("Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.").

convinced that this provision does not satisfy the facial challenge requirements set forth in *Lakewood.*

We consider first the relationship between the terms and conditions provision and expressive conduct, and conclude that any relationship is, at best, incidental. Section 251.56 "does not target First Amendment activities." *Masel,* 54 F. Supp. 2d at 912. It is "not directed narrowly and specifically at expression or conduct commonly associated with expression." *Id.*

The terms and conditions provision does not permit the Forest Service to ban disfavored speech. Moreover, it is applicable to every special use authorization; the clause does not single out a "particular group, activity, or conduct but is directed at all uses of the National Forest." *Id.* at 912-13. Groups seeking to use the national forests for traditionally expressive purposes such as assemblies, meetings, demonstrations and parades need not obtain special use authorization and are not subject to the terms and conditions provision unless their numbers reach or exceed 75. The special use authorization scheme in general and the terms and conditions provision in particular are "directed not at expression, but at the congregation of large numbers of people in the forest." *Id.* at 913. When the provision is triggered, it applies with equal force to recreational, expressive and all other special uses of the forest. "Thus, the regulation is closer to a law of general application." *Id.* at 914. "In this case, the 'terms and conditions' provision 'provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.'" *Id.* at 913 (quoting *Lakewood,* 486 U.S. at 761, 108 S.Ct. 2138).

Although we acknowledge that there is some theoretical possibility that the "terms and conditions" provision could

be invoked to chill protected speech, we are not persuaded that "[t]he risk that Forest Service officials will use nefariously any discretion afforded to them by the . . . provision is . . . great enough to justify invoking the 'extraordinary doctrine' that permits facial challenges." *Id.* at 914 (quoting *Ward,* 491 U.S. at 794, 109 S.Ct. 2746).

Our position with respect to the first prong of the *Lakewood* test is similar to that adopted by the District Court in *Masel:*

> [S]pecial uses cover virtually the entire spectrum of outdoor activities, the majority of which have nothing to do with protected expression. In the absence of empirical evidence demonstrating that a significant proportion of the special use authorizations granted by the Forest Service each year are for speech-related activities, there is no basis to conclude that the terms and conditions provision presents a substantial opportunity for censorship on an ongoing basis.

54 F. Supp. 2d at 913-14. We thus hold that appellants may not make a facial challenge to the regulation.

In the interest of completeness, we note that even were we to entertain such a challenge, we would reject it on the merits because the regulation, as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression. *See* 60 Fed. Reg. at 45,262 (1995). "In evaluating the constitutionality of a regulatory scheme, we should 'presume any narrowing construction . . .' to which the law is 'fairly susceptible.'" 195 F.3d 538, 542 (quoting *Lakewood,* 486 U.S. at 770 n. 11, 108 S.Ct. 2138).

As we have noted, the argument that the terms and conditions provisions of the regulation is purposely vague, giving the Forest Service the ability to invoke health and safety concerns as a pretext for censoring expressive activity, is not a novel one. Since 1995, the Forest Service has consistently taken the position that discretion granted to it under the regulations may only be used to further the government's threefold interest in regulating non-commercial group use of forest land: (1) "protect[ing] resources and improvements on National Forest System lands;" (2) "allocat[ing] space among potential or existing uses or activities;" and (3) "addressing concerns of public health and safety." 60 Fed. Reg. at 45,262 (1995). We agree with the District Court writing in *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999), that the regulation authorizing the Forest Service to impose terms and conditions "necessary to protect the public interest"

> passes constitutional muster, particularly because the Forest Service has specifically identified the "public interests" it seeks to protect . . .. [T]erms and conditions may only be imposed to protect one of the delineated interests. Specifically, "terms and conditions that the Forest Service may impose in a permit are limited to those designed to assure compliance with otherwise applicable health and safety standards; to minimize damage to water quality, fish, wildlife, and other environmental aspects of the forests; and to protect the physical safety of all those in the National Forest System."

Id. at 965.[9] We agree, too with the District Court's finding that:

> Regardless of . . . efforts to describe the terms and conditions provision attached to a special use permit as potentially onerous and oppressive . . . the regulations . . . limit the permitting official's discretion in an objective, constitutionally sound manner.

Id.

Accordingly, we hold that the appellants' facial challenge fails.

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[9] In 1999, the Forest Service promulgated an interpretive rule clarifying the scope of 36 C.F.R. § 251.56. *See* 64 Fed. Reg. 48,959 (1999). This interpretive rule, which essentially embraced the holding in *United States v. McFadden*, 71 F.Supp.2d at 962, reads in relevant part:

> The imposition of terms and conditions in noncommercial group use permits is limited to those designed to further the three public interests identified by the Forest Service in promulgating the noncommercial group rule . . ..

We are aware that the Court of Appeals for the Ninth Circuit held in *United States v. Linick* that, prior to issuance of this interpretive rule, the terms and conditions portion of the special use authorization scheme could have been invoked to attach conditions to the use of a public forum in advance of actual expression and was, as a result, "facially invalid." 195 F.3d at 542. The court concluded that the interpretive rule preserved the constitutionality of the scheme because the scheme, as limited by the rule, satisfied the criteria applicable to a permissible "time-place-manner regulation" of expressive activity. *Id.* at 543.

The court, however, dismissed the information filed against Linick and other defendants alleging a violation of 36 C.F.R. § 261.10(k), reasoning that, because the conduct alleged took place in 1998 and the interpretive rule was not promulgated until September 1999, "[t]he regulation . . . gave the Defendants inadequate notice about the danger of being successfully prosecuted under this newly and narrowly construed regulatory scheme." *Id.* at 544.

As we have explained, we do not agree with the Court in *Linick* that the terms and conditions portion of the regulatory scheme is constitutionally infirm under the criteria set forth in *Lakewood.*

VI.

In a related argument, the appellants contend that the special use authorization scheme is subject to a facial challenge and is unconstitutional because it impinges upon First Amendment rights by not providing for immediate judicial review of overly restrictive search-related terms and conditions which theoretically could be attached to the grant of a permit. The government disagrees, arguing that, under the regulations, immediate judicial review is available to challenge the imposition of terms and conditions: "The Forest Service does not believe that it can require exhaustion [of administrative remedies] in the noncommercial group context."

The government's interpretation of its own regulations is entitled to controlling weight, and this particular interpretation has been adopted by at least one court. *See, e.g., United States v. McFadden*, 71 F. Supp. 2d 962, 966 (W.D.Mo.1999)(upholding government reading of regulations to permit applicants [f]or special use permit to go "directly to court" to challenge terms and conditions attached to permit.) Appellants do not cite caselaw to the contrary.

We are convinced that the government's construction of the relevant regulations is reasonable and that the judicial review provisions of the regulatory [*sic*] are not constitutionally infirm.

VII.

Because we are convinced that the special use authorization scheme was properly applied to these individuals and is constitutional both on its face and as it was applied here, we will affirm each of the Judgments in this Criminal Case.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

United States of America,

v.

Joan H. Kalb, Garrick M. Beck,
and Stephen M. Sedlacko.

Nos. 99-74 ME, 99-75 ME, 99-76 ME.

March 16, 2000.

OPINION

COHILL, Senior District Judge.

Introduction

The three defendants above-named were each charged by Information with a misdemeanor for violation of 36 C.F.R. § 261.10(k): "Use or occupancy of National Forest lands without authorization when such authorization is required."[1]

The regulations considered here govern the noncommercial assembly of 75 or more persons in a national forest. The defendants argue that the regulations are either unconstitutional or simply don't apply to them as individuals.

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[1] For ease in reference the applicable sections of the Code of Federal Regulations ("C.F.R.") have been reproduced in Appendix A, attached to this opinion.

We conducted a two day bench trial, and directed the parties to file proposed Findings of Fact and Conclusions of Law. In accordance with Fed. R. Crim. P. 23(c) we make the general finding that each defendant is guilty as charged and will dismiss their motions for Judgment of Acquittal. In addition, we make the following Findings of Fact and Conclusions of Law.

Findings of Fact

For many years there have been legal skirmishes between a group known as "the Rainbow Family" and the United States Forest Service. *See, e.g., United States v. The Rainbow Family,* 695 F. Supp. 294 (E.D. Tex. 1988). The Rainbow Family, or "Rainbow Family of Living Light," as it is sometimes called is, as one court stated:

> "... an unincorporated, loosely-structured group that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and [to] exchange, develop, express, and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country."

Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D. Or. 1998), *aff'd,* 201 F.3d 1120 (9th Cir. 2000).

The violation of 36 C.F.R. § 261.10(k) is the same charge which many defendants have faced in reported cases as a result of Rainbow Family gatherings. Participants in these gatherings consistently refuse to sign the permit application as required by 36 C.F.R. § 251.50.

The instant citations were issued to defendants Sedlacko and Beck on July 2, and to Kalb on July 5, 1999, in the Bear Creek area of the Allegheny National Forest, Pennsylvania, during a "gathering" of the Rainbow Family.

In late June and early July, 1999, some 20,000 people gathered in the Allegheny National Forest to participate in, or observe, the Rainbow Family gathering.

The Code of Federal Regulations requires noncommercial groups of 75 or more to apply for a permit (often called a "special group use" permit) to gather in a national forest. 36 C.F.R. § 251.50(a). The application is a simple one page document, which each of the three defendants refused to sign. Gov. Ex. 6, 36 C.F.R. § 251.54.

The thrust of their defense is that no one was designated by the Rainbow Family to sign the application because the Rainbow Family is not an entity of any sort, and therefore no one can act on its behalf. Without some sort of designation or authority emanating from the Rainbow Family, so the argument goes, none of these three defendants can be responsible for the failure to obtain a permit.

The Court of Appeals for the Third Circuit has not directly addressed this question. However, this argument was recently rejected by the United States Court of Appeals for the Ninth Circuit. *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000).

The Government argues that because 36 C.F.R. § 251.51 defines "group use" as "an activity conducted on National Forest System lands that involves a group of 75 or more people, either as *participants or spectators*," (emphasis supplied) these three defendants could be cited, since, in the opinion of the Forest Service officers who had contact

with them, they not only were participants, but appeared to have leadership roles at the gathering.

William C. Fox, of Missoula, Montana, a criminal investigator for the U.S. Forest Service, was present at the Allegheny National Forest as the "incident commander" for a national team that is responsible for managing large group events in national forests. (T. 7).

He testified that when he was present at a Rainbow Family gathering in Arizona in the summer of 1998, he was informed by defendant Garrick M. Beck that the Rainbow Family would have a national gathering in the Allegheny National Forest in 1999. (T. 8). He had first met Mr. Beck in March, 1998 in Santa Fe, New Mexico. Mr. Fox said that he also saw an announcement of the 1999 gathering on the Rainbow web site on the Internet. (T. 10). Mr. Fox was quite familiar with these events, having first attended a Rainbow Family gathering in 1992 in Colorado. (T. 10). He knew that there were occasional regional Rainbow gatherings as well as national ones (T. 12), and in conversations with Beck he learned something of the internal organization of the Rainbow Family; it was then that Beck suggested that Fox work with a group he called the "peace keepers", or "Shanti-Sena" of the Rainbow Family, in anticipation of the Allegheny Forest Gathering. An exhibit entitled "Rainbow Guide" (Gov. Ex. 3) describes the so-called councils thus:

> **COUNCILS**
>
> We gather in council circles to voice and creatively resolve the issues and concerns of our ever evolving Gathering. Participation in a council requires a focused mind, a listening ear and an open heart as we make critical decisions on how to best serve the

Gathering. The power to listen is sacred to the process.

Councils occur regularly on all workings of the gathering. They include: Main Council, Coop Council, Vision, Clean-up, Legal team, Shanti Sena, CALM, Info, Rainbow Guide, All Ways Free, Focalizers, Kitchens, firewatch, Bus Village and any other special event, issue or aspect.

Councils are excellent opportunities to help create the Gathering.

In addition to this description of the Councils, there is also a description of the "Main Council" at page 8 of the Rainbow Guide:

MAIN COUNCIL

Main Council is held at rainbow noon in Main Meadow to deal with the business of the Gathering and provide an open forum for anyone and announced by 3 repeated blowings of the conch shell. It is the only time decisions affecting the Gathering can be made.

With the evolution of diverse councils caring for the many needs of the village the question is asked. "Where is Main Council now?"

There was a time when it lasted for days without end. We shared openly what we were learning during the eco-psychedelic revolution. We expressed fears or anger and went away clearer. We addressed all issues, focused our heart songs, and healed our relations. We gave room for all people to share our experience and we were healed. With enthusiasm we

unlocked the mysteries of why we were together as a Rainbow People. Maybe the time to sit together in this way has come again?

At Main Council in New Mexico it was consensed (sic) that the Annual Gathering and the council should begin on June 21 and end on July 10 allow more time to synthesize our community and The Rainbow Family Tribal Council. Seven days goes by quickly. A longer Main Council would lead to a clearer vision of the tribal village. A strong tribal coalition can transform unconsciousness and archaic forms of decision-making into creative enlightened potentials.

This controversial decision begged us to look at the purpose and form of Main Council.

Now with twenty days of council, what can we do? Its up to you. Participate and help redefine Main Council.

Mr. Fox also identified a Rainbow Family manual on how to put on a gathering. (Gov. Ex. 1). He had also printed his own copy of the manual from the Rainbow web site. This exhibit defines Shanti-Sena (the group Mr. Beck suggested Mr. Fox work with) as follows:

Shanti-Sena

Shanti-Sena means "Peace Center"! There are no "Rainbow Police." We are secure because we watch out for each other. We are All Shanti-Sena. Experienced Shanti-Sena hold regular peace keeping workshops which everyone is encouraged to attend at least once. Do you know what to do in an emergency?

The Rainbow Family appears to base much of its organization and activities on the ways of the American Indians, or Native Americans as they are sometimes called. The manual states in part: "*There is no authoritarian hierarchy here.* We have a tribal anarchy where we take care of each other, because we recognize that we are all *One*." (Gov. Ex. 1). It also states:

Gathering on Public Lands

> Our Permit to Gather reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceable (sic) to assemble and to petition the government for redress of grievances."

Gov. Ex. 2 is an announcement of the Allegheny Forest gathering, titled "Rainbow Gathering of the Tribes for World Peace & Healing. June 28-July 10, 1999, Allegheny National Forest, Pennsylvania." It contains directions to the Allegheny National Forest and, among other things, suggestions as to what participants should bring to the gathering.

On the last page this underlined statement appears: "*Please do not sign any permits for 'Rainbow Family Gathering.'*"

The announcement continues:

> "'Congress shall make no law respecting . . . religion, speech, press; or the right of the people peaceably to assemble.' Do administrated (sic) agencies now have powers that the Constitution specifically withheld from Congress? Applying for 'permits' gives authority to 'authorities' to participate in the 'control' of people

assembling and 'permit' a strong 'police presence' and the further ends of the 'control' agenda are met!"

In addition, Mr. Fox identified a "Rainbow Guide." (Gov. Ex. 3). On the front page is a picture of a man and woman sitting in front of a teepee. The Guide contains more details on gatherings, definitions, words and phrases used by the Rainbow Family, and the names and addresses of "Focalizers," people "who let you know what's happening where and when, and who you want to contact when you have info to share. Please remember these people are cool and can use much help in the efforts of focalizing."

Many of the names of people listed as focalizers are simply a first name, such as "Mark" or "Paul" with an address. Others sound like Indian names: "Flickerfeather," ["]Squirrley Possum," "Sun Beat," etc.

At the end of the Guide (page 37) is a form where a person may state his/her name, address, and list, among other things, community, trades, crafts, skills, and projects, and "needs." It states "Contribution $_____. A $4.00 donation will help create a quality guide." The form is to be sent to:

The Rainbow Guide
P.O. Box 1016
Hackensack, N.J. 07602-1016

Mr. Fox testified that he had met "focalizers" both in 1998 and 1999. They let the Forest Service know "where the kitchens were going to be located, where certain individuals were located if we needed to contact somebody. There were times when people stepped forward saying, you know, we're not going to sign, you know, a permit. We're not going to submit an application." (T. 22).

"The focalizer tended to do all of the speaking and the other folks just would sit there and listen. Generally it was the focalizer that I would have the conversation with." (T. 22).

Mr. Fox identified the defendant. Joan H. Kalb, as the focalizer listed in the Guide as "Joanee Freedom." (T. 23). Mr. Fox stated that defendant Garrick M. Beck never identified himself as a focalizer, ". . . but clearly, during the couple of years that, you know, year and a half, that I've known Garrick, he is an individual who is very articulate and very involved with the gatherings. Attended a number of the gatherings himself, and clearly he was an individual, in my opinion, that knows what's going on at these gatherings." (T. 23, 24).

Mr. Fox testified, and we find, that by mid June there were over 75 people at the gathering, and by July 2 to July 5 there were approximately 20,000 people present. (T. 27).

Mr. Fox, in 1998, had told Mr. Beck that the Forest Service was going to require a permit for the 1999 gathering, and he stated that they had also discussed the subject several times in 1999. Each time Beck said they would not apply for a permit. (T. 29).

On or about June 17, 1999, there was a meeting in Ridgway, Pennsylvania, which was the town closest to the gathering. It was convened by the Pennsylvania State Police and some local citizens who were concerned about the impending gathering. About 300 local citizens attended. Mr. Beck attended the meeting and described "who the Rainbows were, and why they were there." (T. 34).

Robin L. Poague, a special agent with the Forest Service, from Glynoco, Georgia, testified that he first came in contact with the Rainbow Family in the spring of 1995

at a gathering in Arizona. (Vol. II, T. 14). On or about June 17, 1999, Mr. Poague spoke with Mr. Beck, who he had met at the 1995 Arizona gathering, Mr. Poague was accompanied by a local Forest Ranger, John R. Schultz. Mr. Schultz had a package containing an application for a group use permit, a copy of the applicable Code of Federal Regulations and a letter addressed to "Rainbow Family Gathering" from John E. Palmer, Forest Supervisor. (Gov. Ex. 6, hereinafter referred to as the "Permit Package"). The letter set forth the need and method to apply for a permit. (Vol. II, T. 19). Ranger Schultz handed the package to Mr. Beck.

Mr. Beck told Mr. Poague and Mr. Schultz that he wanted to take the issue of the permit to the Council.

In early July (probably July 2, 1999) Mr. Poague encountered the defendant Stephen Sedlacko for the first time. (Vol. II, T. 23). Officer Poague was looking for Beck to find out the decision about the permit, and Sedlacko agreed to arrange a meeting with Beck. Later in the afternoon (July 2, 1999) he met with Sedlacko and Beck (Vol. II, T. 26).

Poague told Beck that he was going to cite him for failure to obtain a permit; Beck said he would accept a citation, but didn't want to be cited alone, whereupon Sedlacko volunteered to be cited also. (Vol. II, T. 27). Mr. Poague also knew Mr. Sedlacko by the name "Steven Principle." (Vol. II, T. 27).

Beck proposed that volunteers be provided by the Rainbow Family to accept the citations, which offer Poague refused. Forest Service Officer Steven S. Burd, who was also present, then issued citations to Messrs. Beck and Sedlacko. (Gov. Ex. 10 and 11) (Vol. II, T. 129).

Mr. Sedlacko had written a column in a Rainbow tabloid (Gov. Ex. 7) under the name "Stephen Principle" with the headline: "'Permit'-tion and our right to gather." On the opposite page was a column entitled "Legally Speaking" which purported to report a conversation between Stephen Principle and one Scottie Addison, discussing "unfavorable" court rulings on the permit issue.

Ranger John R. Schultz testified regarding defendant Joan Kalb, who had first been identified to him as "Joanie Freedom." Mr. Schultz is stationed at the Allegheny National Forest, but had attended other Rainbow gatherings. (Vol. II, T. 79).

The circumstances of the initial meeting with Ms. Kalb were these: On May 29, 1999, Ranger Schultz and one of his staff, Arnie Irvine, went out to the location of the gathering. They had heard that the Rainbow Family was having a spring council meeting, and they wanted to locate where it might be. They came upon a group of forty to fifty people who were talking. (Vol. II, T. 79). Ms. Kalb "pinched off" the conversaion and invited the officers to speak to the group. Schultz discussed the need for a permit with Ms. Kalb and the group for about an hour and a half. (Vol. II, T. 81). He attempted to present the Permit Package, but no one would accept it. (Vol. II, T. 83).

Officer Schultz met Ms. Kalb again on June 11, 1999, and attempted to present the Permit Package. Again, no one present would accept it, so he left it on the ground in front of the group. (Vol. II, T. 83).

On June 12, 1999, he again met with Ms. Kalb, "didn't make any progress on the permit issue itself," but then discussed in detail with her resource management plans as well as the operational aspects of the gathering. (Vol. II, T. 83, 84).

On July 5, 1999, at the direction of Officer Schultz, Officer Burd issued a citation to Ms. Kalb. (Vol. II, T. 132).

It is clear from the testimony of the government witnesses that there was never any animosity or acrimony between the Forest Service personnel and the defendants; indeed, they were on a first-name basis. The defendants simply refused to sign the permit application when requested to do so by the officers after lengthy conversations with them.

It is also clear from the trial testimony and the exhibits that there is quite a complete internal organization of the Rainbow Family in the form of the Councils and committees. The members simply attempt to avoid the permit application requirements by refusing to designate an applicant.

Conclusions of Law

The main thrust of the defendants' argument is that they cannot be cited as individuals since they have not been designated by the Rainbow Family to act on the group's behalf. According to the defendants' brief, page 13, the group "refused" to designate anyone to act, therefore these defendants are immune from prosecution. This argument was discussed and rejected by a court of appeals as recently as February 9, 2000. *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000). *See also, United States v. Masel*, 54 F. Supp. 2d 903, 920 (W.D. Wis. 1999); *United States v. Rainbow* Family, 695 F.Supp. 294, 298 (E.D. Tex. 1988).

The defendants have not only fit the definition of "participants" in this gathering but also, as discussed in our Findings of Fact, had leadership roles as spokespersons for the Rainbow Family. They are certainly valid objects of prosecution.

The defendants further argue that the noncommercial group use regulation is unconstitutional in that it abridges their rights under the First Amendment. This proposition has also been rejected. "The exercise of civil liberties depends upon the existence of 'an organized society maintaining public order;' thus civil liberties must occasionally give way to laws 'designed to promote the public convenience in the interest of all.'" *Masel*, 54 F. Supp. 2d at 907 (quoting Cox v. *State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L. Ed. 1049 (1941)).

The Fourth Circuit Court of Appeals thoughtfully discussed this issue in *United States v. Johnson*, 159 F.3d 892 (4th Cir. 1998). The case arose, as so many other "Rainbow Family cases" have, this time, during a gathering in the Pisgah National Forest, North Carolina.

Four individuals were cited for their refusal to apply for a special use permit. One of their defenses was that the Forest Service permit requirement violated their First Amendment free speech and freedom of association rights. They argued that the regulations were unconstitutional because they burdened "substantially more expression than necessary to further the government's legitimate interests." 159 F.3d at 895 (quoting from appellants' brief). The law is clear that when "expressive conduct" occurs on public grounds, the government can impose reasonable "time, place and manner" restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L. Ed. 2d 661 (1989). Furthermore, such restrictions are constitutionally valid "as long as they are (1) content neutral, (2) 'narrowly tailored to serve a significant governmental interest,' and (3) 'leave open ample alternative channels for communication of the information.'" *United States v. Johnson*, 159 F.3d at 895, quoting *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *see also Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct.

2395, 120 L. Ed. 2d 101 (1992). The court then went on to hold that the regulations clearly serve three purposes: to protect resources and improvements on National Forest System lands, allocate space among potential or existing uses and activities, and redress concerns of public health and safety. *Id.* at 895; 60 Fed. Reg. 45,258, 45,262 (1995).

The opinion then stated: "The permit serves these three purposes in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service personnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur." *Id.* at 896.

The national forest lands are a precious asset of this nation. While the members of the Rainbow Family may regard the environment as something to be guarded and treasured, and while they may be conscientious about protecting those lands when they are present on them, other groups may not be. It would be an impossible assignment for the Forest Service to predict that one group will not harm a national forest and that another group might. There must be some method in place to maintain "the public order;" it is not an abridgment of First Amendment freedoms if the law is narrowly tailored to serve a significant governmental interest. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746; *Masel,* 54 F. Supp. 2d at 907. We thus reject the argument that the requirement of a permit is violative of the First Amendment.

Defendants also argue that the term "group use" as defined in 36 C.F.R. § 251.51 is "vague and overbroad." This is another argument advanced in many Rainbow Family cases; it likewise has been analyzed by the courts and then dismissed. *See Black,* 18 F. Supp. 2d at 1132 and cases cited therein. From the many examples in the Rainbow Family printed material, as quoted in our Findings of

Fact, it is clear that the Rainbow Family is a well organized group. We thus reject the argument that their use of national forest lands is not a "group use."

The defendants, in their supplementary brief, have raised a facial challenge to the regulations, citing *United States v. Linick,* 195 F.3d 538 (9th Cir.1999). In *Linick* a district court judge had considered a Rainbow Family facial challenge to 36 C.F.R. § 251.56(a)(2)(vii). This is the provision that states in pertinent part: "Each special use authorization shall contain:

***

(2) Such terms and conditions as the authorized officer deems necessary to . . . .
(vii) otherwise protect the public interest."

In that case two members of the Rainbow Family were charged in an information with use of the Apache-Sitgreaves National Forest, Arizona, in June, 1998, without a permit. The district court granted the defendants' motion to dismiss, ruling that the quoted section gave Forest Service officers "impermissibly broad discretion in violation of the First Amendment" and was therefore unconstitutional on its face. *Linick,* 195 F.3d at 541.

The Court of Appeals for the Ninth Circuit affirmed the dismissal of the citations, relying particularly on City *of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S.Ct. 2138, 100 L. Ed. 2d 771 (1988). In that case a city ordinance gave the mayor of Lakewood the authority to grant permits to place newsracks on public property. The ordinance allowed the mayor to attach to the permit any "terms and conditions deemed necessary and reasonable." *Id.* at 754, 108 S.Ct. 2138. The Supreme Court suggested that this resulted in the mayor having "impermissible

discretion to deny expressive activity." *See id.* at 769, 108 S.Ct. 2138.

The Ninth Circuit Court then took an unusual step. The gathering in question had occurred in June, 1998. In September, 1999 (perhaps in response to the holding of the district court in *Linick*), the Forest Service issued an interpretive rule relative to 36 C.F.R. § 251.56. *See* Fed. Reg. 48,959. The rule stated in relevant part:

> The imposition of terms and conditions in noncommercial group use permits is limited to those designed to further the three public interests identified by the Forest Service in promulgating the noncommercial group use rule, i.e., the need to address concerns of public health and safety, to minimize damage to National Forest System resources, and to allocate space among actual or potential uses and activities.

The court then went on to hold that the interpretive rule served to preserve "the constitutionality of the regulatory scheme because the scheme now satisfies the three-part test for time-place-manner regulation." *Linick*, 195 F.3d at 543.[2]

However, the interpretive rule came more than a year after the citations were given to the defendants. Thus, the court held that while the interpretive rule now preserved

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[2] As previously noted, *infra* [sic], the government may regulate the time, place, and manner of expressive activity in a public forum, so long as the regulatory scheme is (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave[s] open "ample alternatives for communication." *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct. 2395, 120 L. Ed. 2d 101 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L. Ed. 2d 661 (1989).

the constitutionality of the regulation, it was not retroactive in effect. The court then affirmed the district court on its dismissal of the information, but reversed the district court's ruling that the regulation itself was unconstitutional.

The chronology in the case at bar is similar to that in *Linick* – the September, 1999, interpretive rule came after the July, 1999 Rainbow gathering in the Allegheny National Forest. The defendants thus argue that we should follow *Linick* and dismiss the charges.

We respectfully decline to follow *Linick*. We believe the reliance of the Ninth Circuit court on *Lakewood* is misplaced. The Lakewood ordinance was aimed directly at the placement of newspaper stands, so of course, carried to its logical extreme, the mayor was given the unfettered power to prohibit or otherwise control where news could be dispensed, a direct assault on the First Amendment both in terms of freedom of the press and freedom of expression.[3]

We do not see how such infringement could carry over to the Forest Service permit considered here. The language *Linick* held to be objectionable was that which stated that the permit could contain "such terms and conditions as the authorized officer deems necessary to . . . (iii)[sic] otherwise protect the public interest."

The Ninth Circuit Court of Appeals speculated that "the Forest Service's broad discretion to attach terms and conditions to a permit can be abused in a manner that could limit the use of public lands by parties who hold political views that are disfavored by the Forest Service." *Linick*, 195 F.3d at 542. We feel that it is a stretch to say that

---

[3] Although we agree with the holding in *Lakewood*, it was a close 4-3 decision with two justices not participating.

Lakewood should be precedent for a holding that the language in question was facially unconstitutional. In any event, we need not reach the effect of the interpretive rule. Even without it, the regulation was clearly intended to regulate conduct relative to public health and safety, not speech or expression.

We therefore decline to follow the holding in *Linick*.

Conclusion

The defendants are guilty as charged. It would be impossible to estimate the judicial resources that have been expended through the years in the many legal contests between the Rainbow Family and the Forest Service. In this case alone, Forest Service personnel from Georgia and Montana had to be separated from their regular duties to come to Pennsylvania to testify, as did personnel assigned to duties in the Allegheny National Forest. Obviously, scarce resources of the Court, the Justice Department and the Forest Service have been expended to handle this case and the many others involving the Rainbow Family through the years, and always over the same issue – refusal to apply for a permit.

Perhaps the Ninth Circuit Court of Appeals considered the interpretive rule, when it was not even an issue in the *Linick* case, in the hope of heading off yet another Rainbow Family case which might challenge the efficacy of the new interpretive rule at sometime in the future.

It's not as if the issues considered here were "landmark" in nature; time and again the Rainbow Family has made the same arguments and had them rejected by courts all over the United States.

While the "mouse-that-roared" syndrome sometimes has the appeal of tweaking the authorities on the nose, we hope that the time to stop has finally arrived.

[District Court] Appendix A

For ease in reference, the applicable sections of the Code of Federal Regulations are set forth here.

36 CFR § 251.50 Scope

(a) . . . Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special authorization from the authorized officer . . .

36 CFR § 251.51 Definitions

"Applicant" – any individual, partnership, corporation, association . . . which applies for a special use authorization.

"Group Use" – an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

"Holder" – any applicant who has received a special use authorization.

"Noncommercial use or activity" – any use or activity that does not involve a commercial use or activity[.]

"Special use authorization" – a permit . . . which allows occupancy, use, rights or privileges of National Forest System land.

36 CFR § 251.54 Proposal and application requirements and procedures

* * *

(d) Proposal content-

(1) Proponent identification. Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(2) Required information –
(i) Noncommercial group uses . . . A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;
(B) The location and a description of the lands and facilities the proponent would like to use;
(C) The estimated number of participants and spectators;
(D) The starting and ending time and date of the proposed activity; and
(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

* * *

(g) Application processing response.

* * *

(3) Response to applications for noncommercial group uses.

* * *

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

* * *

(H) A person or persons 21 years of age or older have been designated to sign and do sign a special use application on behalf of the applicant.

The 1998 version:

36 CFR § 251.56 Terms and conditions.

(a) General. Each special use authorization shall contain:

* * *

(2) Such terms and conditions as the authorized officer deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands subject to use or adjacent thereto; (iii) protect other lawful users of the lands adjacent to or occupied by such use; (iv) protect lives and property; (v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (vi) require siting to cause least damage to the environment, taking into consideration feasibility

and other relevant factors; and (vii) otherwise protect the public interest.

The 1999 version contains exactly the same language, except that the numbers and letters denoting this section are different.

36 CFR § 261.10 Occupancy and use.

The following are prohibited:

* * *

(*l*) Use or occupancy of National Forest System land or facilities without special use authorization when such authorization is required.

APPENDIX C

1. The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 551 of Title 16 of the United States Code provides that:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of Section 471 of this Title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Section . . . or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in Section 3401(b) to (e) of Title 18.

3. The relevant portions of Part 251 and 261 of Title 36 of the Code of Federal Regulations provide as follows:

Note: The following sections are numbered as they were originally promulgated, *cf.* 60 Fed. Reg. 45,293-95 (August 30, 1995), because the courts below used those numbers. *See* App. 3a n. 2. A later recodification – non-substantive for relevant purposes – renumbered some of these sections, 63 Fed. Reg. 65949-69 (Nov. 30, 1998), so the current section numbers, where different, are specified in brackets.

§ 251.50 [same] Scope

(a) All uses of National Forest System lands, improvements, and resources, except those [concerning] . . . disposal of timber . . . and minerals . . . and the grazing of livestock . . . are designated "special uses." Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization from the authorized officer unless that requirement is waived by paragraph (c) of this section.

* * *

(c) A special use authorization is not required for noncommercial recreational activities such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating, as well as noncommercial activities involving the expression of views such as assemblies, meetings, demonstrations, and parades, except for:

* * *

(3) Noncommercial group uses as defined in § 251.51 of this subpart.

* * *

251.51 [same] Definitions

"Applicant" – any individual, partnership, corporation, association . . . which applies for a special use authorization.

"Authorized officer" – any employee of the Forest Service to whom has been delegated the authority to perform the duties described in this part.

* * *

"Group Use" – an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

"Holder" – any applicant who has received a special use authorization.

* * *

"National Forest System land" – all lands, waters, or interests therein administered by the Forest Service.

* * *

"Noncommercial use or activity" – any use or activity that does not involve a commercial use or activity.

"Permit" – a special use authorization which provides permission, without conveying an interest in land, to occupy and use National Forest System land or facili-

ties for specified purposes, and which is both revocable and terminable.

"Revocation" – the cessation of a special use authorization by action of an authorized officer before the end of the specified period of occupancy or use for reasons set forth in § 251.60(a)(1)(i) . . . of this subpart.

* * *

"Special use authorization" – a permit . . . . which allows occupancy, use, rights or privileges of National Forest System land.

* * *

§ 251.53 [same] Authorities.

Subject to any limitations contained in applicable statutes, the Chief of the Forest Service, or other Agency official to whom such authority is delegated, may issue special use authorizations for National Forest System land under the authorities cited and for the types of use specified in this section as follows:

(a) Permits governing occupancy and use, including group events and distribution of noncommercial printed materials, under the Act of June 4, 1897, 30 Stat. 35 (16 U.S.C. § 551).

* * *

§ 251.54 [see brackets *infra*] Proposal and application requirements and procedures.

* * *

(b) *Filing Proposals.* Proposals for special uses must be filed in writing with or presented orally to the District Ranger or Forest Supervisor having jurisdiction over the affected land . . .

* * *

[d] (e) *Proposal content* –

(1) *Proponent identification.* Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(2) *Required information* –

(i) *Noncommercial group uses.* . . . A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the lands and facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

(D) The starting and ending time and date of the proposed activity; and

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

* * *

[g] (f) *Application processing and response.*

* * *

[3] *Response to applications for noncommercial group uses.*

[i] (5) All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses pursuant the determination as set forth below, unless applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60 (a)(1)(i).

[ii] (h)(1) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

* * *

[H] (viii) A person or persons 21 years of age or older have been designated to sign and do sign

a special use application on behalf of the applicant.

[iii] (2). . . A denial of an application under paragraphs (h)(1)(i) [(g)(3)(ii)(A)] through (h)(1)(viii) [(g)(3)(ii)(H)] of this section constitutes final agency action and is immediately subject to judicial review.

* * *

§ 251.56 [see brackets, *infra*] Terms and conditions.

(a) *General.* Each special use authorization shall contain:

* * *

[ii](2) Such terms and conditions as the authorized officer deems necessary to:

[A](i) protect Federal property and economic interests;

[B](ii) manage efficiently the lands subject to use or adjacent thereto;

[C](iii) protect other lawful users of the lands adjacent to or occupied by such use;

[D](iv) protect lives and property;

[E](v) protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;

[F](vi) require siting to cause least damage to the environment, taking into consideration feasibility and other relevant factors; and

[G](vii) otherwise protect the public interest.

* * *

§ 251.60 [same] Termination, revocation, and suspension.

(a) *Grounds for termination, revocation, and suspension.*

(1) *Noncommercial group uses.*

(i) *Revocation or suspension.* An authorized officer may revoke or suspend a special use authorization for a noncommercial group use only under one of the following circumstances:

(A) Under the criteria for which an application for a special use authorization may be denied under § 251.54(h)(1) [251.54(g)(3)(ii)];

(B) For noncompliance with applicable statutes or regulations or the terms and conditions of the authorization;

(C) For failure of the holder to exercise the rights or privileges granted; or

(D) With the consent of the holder.

(ii) *Administrative or judicial review.* Revocation or suspension of a special use authorization under this paragraph constitutes final agency action and is immediately subject to judicial review.

* * *

(b) For purposes of this section, the authorized officer is that person who issues the authorization or that officer's successor.

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§ 261.1b [same] Penalty

Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C. section 551, unless otherwise provided.

§ 261.10 [see brackets *infra*] Occupancy and use.

The following are prohibited:

* * *

[k] (*l*) Use or occupancy of National Forest System land or facilities without special use authorization when such authorization is required.

[*l*] (m) Violating any term or condition of a special use authorization, contract or approved operating plan.